

FINDINGS OF FACT

Respondent arranges potential organ and tissue transplants from deceased and/or seriously injured individuals. Claimant began working as a donation service coordinator for respondent on April 26, 2010. Claimant testified that on October 3, 2012, she was in the process of carrying a kidney pump, which weighed approximately 50 pounds, when she took about two steps and felt a sudden, sharp pain in her lower back. Claimant told a coworker, Katie Cox, that she had injured her back, but did not report it to her supervisor, Peter Dow. She testified she was afraid she would be fired if she reported the incident, as she had already missed significant time for a personal medical condition.

Claimant continued to work her regular shifts and did not seek medical attention, hoping she had a pulled muscle that would go away. Claimant went on her own to the Research Medical Center emergency room on or about October 12 or 13, 2012.¹ Claimant did not tell Research Medical Center personnel that she had been hurt at work.

On October 22, 2012, claimant went on her own to the Shawnee Mission Medical Center (SMMC) emergency room. Claimant complained of severe back pain that started one hour ago while sitting at her desk, but also that she had mild low back pain for two weeks. Another report noted increasing back pain for two weeks that significantly worsened when claimant was sitting at her desk. Examination of claimant's back revealed marked tenderness in the lumbar spine and pain with movement and axial compression. Claimant was diagnosed with low back pain and admitted to the hospital.

Lumbar x-rays showed no compression fractures. An MRI study showed L5-S1 mild degenerative disk disease, very mild retrolisthesis, mild central canal stenosis, and a small L4-5 right facet joint synovial cyst. Brian G. Mills, M.D., was unable to administer a lumbar epidural steroid injection due to an abnormal urinalysis. Claimant declined physical therapy. She was diagnosed with low back pain with degenerative disk disease, but there was also a notation of "drug seeking behavior suspected." Claimant was discharged on October 25, 2012, to resume activities as tolerated with no heavy lifting.

On October 25, 2012, claimant sought treatment through the SMMC emergency room immediately following her hospitalization. Claimant complained of low back pain radiating into the right lower extremity. She stated, "I am still in pain and don't want to go home." Examination of back by Brett R. Hailey, M.D., revealed nontender, normal alignment, no step-offs and decreased range of motion. Dr. Hailey noted claimant appeared "improved and [not] ill enough to require further ongoing ED management or inpatient hospital admission." She was diagnosed with back strain and herniated disk. Claimant was prescribed Lortab and discharged. Claimant returned to regular duties.

¹ There are no medical records in evidence to substantiate this treatment or the dates of service.

At some unknown time, claimant went to North Kansas City Hospital for low back treatment, but she did not inform hospital personnel that she had been hurt at work.

A Walgreens representative called SMMC on October 25, 2012, to alert that claimant was obtaining prescriptions from multiple providers. Maria L. Petersen, APRN, entered the following in claimant's SMMC October 25, 2012 emergency room record:

I received a call from Walgreens pharmacy that is concerned patient is coming in with multiple RX for pain medications. Has two RX for narcotics both written on sameday, one from us here, Dr. Hailey for lortab #12 and one from North Kansas city for percocet. Informed Walgreens I would make note in her chart and they stated that they would not be filling our RX, agreed with plan.

Claimant went to the SMMC emergency room on October 30, 2012, at 4:42 a.m., and was seen by Amanda D. Diskin, APRN. Claimant complained of low back pain with onset seven days ago while at work, but she denied injury. Ms. Diskin noted claimant's urine specimen had the appearance and odor of water. Claimant had diffuse and mild lumbar tenderness. Ms. Diskin diagnosed claimant with back pain, discharged her and advised follow-up with her primary care physician and pain management.

Claimant returned to the SMMC emergency room on October 30, 2012, at 6:49 a.m., (even before her prior discharge paperwork had been completed) and was again seen by Ms. Diskin, who noted claimant was stumbling over her words and slow to respond. Claimant stated, "If you don't [sic] admit me, I'll just keep checking in." Ms. Diskin discussed the importance of receiving pain medications from one primary care physician. Claimant was diagnosed with back pain and discharged.

Claimant reported her accident to Mr. Dow via email on November 1, 2012. She only told him she was asserting a work-related back injury after Mr. Dow sent her an email that she had no remaining personal leave time and he needed to see her personal medical condition records. She emailed Mr. Dow and let him know that he was "confused" because she had been off work due to a "back injury that happened at work"²

On November 2, 2012, claimant was seen by Daphne L. Fry, APRN, at SMMC with complaints of axial back pain and bilateral anterior thigh pain. This was the first time claimant relayed to a medical provider the history of lifting a large pump at work as the cause of her symptoms. Claimant reported that her low back pain had been so severe that she needed a walker to ambulate. Examination of claimant's back showed positive diffuse tenderness to the lumbosacral spine. Claimant was diagnosed with lumbar radiculopathy and lumbar disc displacement. She was given a lumbar epidural steroid injection by Dr. Mills and discharged.

² P.H. Trans., Resp. Ex. A at 36.

Claimant was seen by Douglas Rope, M.D., at Occupational Health Services, at respondent's request on November 2, 2012. Claimant complained of severe lower back pain with sharp discomfort into the thighs. She rated her pain at an 8-9 on a scale of 10. Claimant indicated she was taking 5-6 Percocet tablets daily, Gabapentin 300 mg 4 times daily, and Valium 5 mg 4 times daily. When Dr. Rope questioned her as to why she did not report the injury to her employer earlier, she indicated "she assumed that hospital personnel or other people would make the appropriate report."³ Dr. Rope diagnosed claimant with low back strain with questionable radicular findings. Dr. Rope noted:

Although she may indeed be having genuine low back discomfort, her ability as observed to move about the clinic as well as the absence of significant tenderness or any muscle spasm in the lumbar paraspinal areas on examination appears at odds with her need for multiple medications multiple times daily, including large doses of narcotic agents.⁴

Claimant returned to Occupational Health Services on November 9, 2012, and was seen by Cynthia Gill, D.O. Claimant complained of severe back pain, as well as numbness and tingling down both legs. Dr. Gill initially noted it was "unclear whether the workplace is the prevailing cause of her low back pain[,] but her assessment was "[l]ow back pain of unknown etiology" and that it was "more likely than not that the prevailing cause of the patient's condition is not the workplace."⁵ Dr. Gill recommended physical therapy and released her to modified duty through November 23, 2012 of no standing, sitting or walking greater than 30 minutes at a time.⁶ Claimant testified respondent put her on leave for not being able to fulfill her duties because of the restrictions.

In Dr. Gill's November 9, 2012 letter, she noted inconsistencies in claimant's history as provided at various times to SMMC personnel (mainly involving the timing of the onset of complaints), along with what she viewed as "drug seeking behaviors" and the likelihood claimant only "came up with a low back injury that occurred on 10/03/12" when it was apparent she had no remaining leave time.⁷ Dr. Gill wrote, "Given these facts it is my opinion, within a reasonable degree of medical certainty, that it is more likely than not that the prevailing cause of the patient's condition is not the workplace."⁸

³ P.H. Trans., Cl. Ex. 1 at 9.

⁴ *Id.*, Cl. Ex. 1 at 10.

⁵ *Id.*, Cl. Ex. 1 at 5-6.

⁶ *Id.*, Cl. Ex. 1 at 3. Dr. Gill's November 9, 2012 report, which was dictated and transcribed on November 21, 2012, indicated claimant was released to full duty. *Id.*, Cl. Ex. 1 at 6.

⁷ *Id.*, Cl. Ex. 1 at 7-8.

⁸ P.H. Trans., Cl. Ex. 1 at 8.

Respondent terminated claimant's employment on November 20, 2012.

On December 26, 2012, claimant was seen by Donna H. Ruck, APRN, at The Pain Management Institute, with complaints of constant back pain intermittently radiating into her upper legs. Claimant was diagnosed with low back and bilateral leg pain. Claimant's urinalysis was appropriate for her listed medications. Claimant was prescribed Opana, Naprelan and Gralise and advised to discontinue Percocet and Gabapentin.

Claimant was seen at SMMC on January 28, 2013, at 3:46 p.m., by Kirsten L. McGuire, APRN, with abdominal and back pain. She indicated pain onset was one day ago and was in the left, flank and left lumbar areas. Claimant was diagnosed with chronic back pain, prescribed Valium and discharged.

On January 28, 2013, at 11:41 p.m., claimant returned to the SMMC emergency room and complained of continued back and abdominal pain with onset 12 hours ago. Examination of the back showed it was nontender, with normal range of motion. John S. Bradley, D.O., diagnosed claimant with abdominal pain and nausea, prescribed Vistaril, Pepcid, Norco and Zofran, and discharged her.

A preliminary hearing was held February 20, 2013. Claimant testified her leg pain had improved, but she still had severe low back pain. She admitted having abdominal issues for over a year, but denied associating her back pain with her abdominal issues. Claimant admitted that she did not inform Research Medical Center, North Kansas City Hospital or SMMC personnel that she had a work-related injury because she was worried about being fired.⁹

As noted above, Judge Hursh ruled that claimant did not prove that a work-related injury occurred or that she provided timely notice. Claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on claimant to establish claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

⁹ This contradicts Dr. Rope's November 2, 2012 report wherein claimant told him she did not report the injury to her employer earlier as she assumed that hospital personnel would make the appropriate report.

K.S.A. 2012 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

This Board Member affirms Judge Hursh's conclusions and also finds claimant did not meet the prevailing factor requirements under the post-May 15, 2011 law.

Regarding whether claimant sustained an injury at work, the evidence is not in her favor. Dr. Gill indicated claimant's workplace was not the prevailing cause of her condition. The claimant had multiple opportunities to tell medical providers at three different hospitals that she had been hurt at work. Claimant only alleged that she had been hurt at work after Mr. Dow inquired about possibly terminating her employment because she had been away from work too much. It is bizarre that claimant would tell Mr. Dow that *he* was somehow confused when she never previously told him that she hurt her back at work. It also makes little sense that claimant would want to conceal from her employer the fact of her alleged injury, but simultaneously assume hospital personnel would have informed respondent that she had been hurt at work. The staff members at the hospitals claimant visited would not have been able to communicate with respondent about a work injury when claimant never told hospital personnel about a work injury until November 2, the day after she advised Mr. Dow about her injury.

Judge Hursh questioned claimant's credibility and did not find that a work injury occurred. Based on the current evidence, this Board Member agrees with his assessment.

Claimant testified that she thought she received treatment at Research Medical Center on October 12 or 13, 2012. Dr. Rope's report indicated that claimant told him she had received medical treatment for her injury at Research Medical Center around October 6 or 7, 2012. Based on this evidence, notice was untimely, as being provided more than 20 days after claimant sought medical treatment. Perhaps if the parties obtain such records and the dates turn out to be different, either Judge Hursh or the Board may need to revisit the notice issue. However, the current record establishes that notice was untimely. While claimant has excuses why notice was not provided earlier, there is no just cause provision in the new act.

CONCLUSIONS

Claimant did not prove she was injured arising out of and in the course of her employment. She failed to prove timely notice.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

The Board reminds counsel that only relevant medical records need to be placed into evidence. The majority of the 377 pages of records from SMMC have no bearing on the case.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated February 25, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Kenneth J. Hursh

¹⁰ K.S.A. 44-534a.